

**Public International Law Research Paper**

**The Legality of Drone Strikes: A**  
**Case Study on the Killing of**  
**Ayman Al-Zawahiri**

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## **I. Introduction**

Armed drone strikes, or strikes carried out by Unmanned Aerial Vehicles (UAV), have recently emerged as a crucial tactic in modern warfare; they allow for intelligence organizations to remotely target enemy groups or people, without exposing one's forces to risk. Drones are equipped with cutting-edge sensors and cameras, that allow for easier tracking of targets, and precision-guided missiles, that allow for attacks with little to no collateral harm. Modern warfare and counterterrorism operations have seen the prominent growth of drone strikes in targeted killings. Targeted killings are the premeditated and purposeful use of fatal force by States acting under domestic or international law, or by an organized armed group engaging in armed conflict, against a particular person that is not in their physical custody. Consequently, they are considered a huge step in the battle against terrorism threats and asymmetric warfare.

For the United States, the use of drones has become the most prominent tool in the war against terrorism and anti-American militant groups, especially since the 9/11 attacks. The use of such attacks has helped kill key leaders of terrorist groups in countries such as Pakistan, Yemen and Somalia. As the rate of these strikes have increased, so have criticisms from humanitarian groups, claiming that the use of drone strikes by the US violate international legal norms and standards. This is due to the innate lack of transparency, accountability and due process undertaken by the government, as well as the use of strikes in situations that do not legally qualify as armed conflict or are outside of traditional combat zones. This paper attempts to analyze the legality of one such targeted killing conducted by the United States, Ayman Al-Zawahiri, based on the principles of International Law.

## **II. The Death of Ayman Al-Zawahiri**

Ayman al-Zawahiri was an Egyptian doctor and the commander of al-Qaeda, a militant Islamist organization. Before his role as commander, he was a close associate of the previous al-Qaeda leader, Osama bin Laden. He has been involved in the planning and execution of many of al-Qaeda's attacks, including the 1998 US Embassy bombings in Africa, the 2000 bombing of the USS Cole in Yemen, the 2002 Bali bombings, as well as the infamous 9/11 attacks on the United States.<sup>1</sup> After al-Qaeda was expelled from Sudan by the Sudanese government, Zawahiri and Laden had to shift their base to Afghanistan, where they established training camps and bases of operations. Post the 2001 attacks on the US, they went into hiding in Afghanistan. After Laden died in 2011, Zawahiri took over as the organization's head, while still in hiding.

In a press release on August 2022, the US National Security Council stated that they had been watching for indications of al Qaeda's presence in Afghanistan, and in 2022, they identified a safe house in Kabul that housed Zawahiri and his family.<sup>2</sup> After consultation with the President, Joe Biden, an airstrike was authorized. The strike was at 9:48 p.m. EST on July 30th by an UAV that fired two Hellfire missiles at Zawahiri while he was standing on the balcony.<sup>3</sup> His family members were at a different location in the house and were not harmed. The strike was the US's first significant operation in Afghanistan after their withdrawal from the nation in 2021. It has been described by critics as a "triumph of American exceptionalism over international law."<sup>4</sup> Reasons

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<sup>1</sup> Abu-Rabi', Ibrahim M., et al. "Introduction: Ayman al-Zawahiri as I Knew Him." *The Road to Al-Qaeda: The Story of Bin Laden's Right-Hand Man*, edited by Sara Nimis, Pluto Press, 2004, pp. 1–14. JSTOR, <https://doi.org/10.2307/j.ctt18fs95x.6>. Accessed 19 Mar. 2023.

<sup>2</sup> "Background Press Call by a Senior Administration Official on a U.S. Counterterrorism Operation" The White House, 1 August 2022, <https://www.whitehouse.gov/briefing-room/press-briefings/2022/08/01/background-press-call-by-a-senior-administration-official-on-a-u-s-counterterrorism-operation/>. Press release.

<sup>3</sup> Ibid.

<sup>4</sup> Saul, Ben. "The Unlawful U.S. Killing of Ayman Al-Zawahiri." *Lawfare*, 19 Aug. 2022, <https://www.lawfareblog.com/unlawful-us-killing-ayman-al-zawahiri>.

for this are said to include the fact that the killing was done nearly two decades after the 9/11 attacks, as well as the fact that the US counter-terrorism activism has splintered al-Qaeda into smaller rivalrous networks. It is therefore imminent to adjudicate the legality of the strike under the principles of international law applicable to the United States.

### **III. Legality under International Law**

Multiple areas of international law govern the legality of the use of armed drones. Drone strikes often come under the jurisdiction of international law because they involve the use of extraterritorial force against individuals usually located in another state. It also has the capability of harming international peace and security, as it may destabilize the regions where they are being carried out. The legality of a drone strike is in itself a complex and contentious issue, and it must satisfy the conditions under the various international law frameworks. The targeted killing of Ayman Al-Zawahiri has been analyzed under the following frameworks.

#### **1. United Nations Charter and Jus Ad Bellum**

Jus Ad Bellum refers to the requirements that must be completed for a state to be able to employ military force or engage in war legally. It focuses on the principle of state sovereignty and territorial integrity, to protect the legal rights of the States.<sup>5</sup> The United Nations Charter, which governs relations between States, declares under Article 2(4) that all members will refrain from the threat or the use of force against another State. While the use of force is subject to Article 2(4) of the UN Charter, the principle of jus ad bellum allows for territorial States to give consent for another State to use drones to target non-State actors on the former's territory. The first question

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<sup>5</sup> Heyns, Christof, et al. "THE INTERNATIONAL LAW FRAMEWORK REGULATING THE USE OF ARMED DRONES." *The International and Comparative Law Quarterly*, vol. 65, no. 4, 2016, pp. 791–827. *JSTOR*, <http://www.jstor.org/stable/26348270>. Accessed 20 Mar. 2023.

that arises then is whether the strike on Zawahiri violated the sovereign rights of Afghanistan. At the point of time of the strike, the Taliban, who were the de facto rulers of the state of Afghanistan, denounced the strike itself,<sup>6</sup> making consent an invalid point of consideration. The Doha Agreement, signed between the US and the Taliban to prevent al-Qaeda's activities on Afghan soil to cause harm to the US, has also been violated, given the presence of al-Zawahiri in Kabul.<sup>7</sup> This can further establish the Taliban's unwillingness to provide consent to a strike as required by the Charter. This establishes a violation of their sovereign rights, whether the Taliban is considered the de facto ruler of the State or not. Consequently, the use of force without prior consent is prohibited under the jus ad bellum, rendering the strike illegal.

The question then arises of whether the US has a right of self-defence against al-Qaeda under Article 51 of the U.N. Charter. Article 51 of the Charter provides an exception to Article 2(4); it allows for States to invoke an argument of self-defence to justify the use of force, especially when an armed attack has taken place on it, or there is an imminent threat of an armed attack. In the ICJ case of *Nicaragua v. United States*, the court held that self-defence is only applicable when State governments send armed groups, and not when they attack independently.<sup>8</sup> The ICJ, however, allowed for violence by a non-state group to be considered an armed attack if it was of sufficient gravity to equate to a state-armed attack, a condition the 9/11 attacks by al-Qaeda met. However, the US drone strike on Zawahiri comes nearly two decades after the 9/11 attacks, making it hard

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<sup>6</sup> "Taliban Leaders Meet on How to Respond to US Drone Strike in Kabul: Report." NDTV.com, NDTV, 3 Aug. 2022, <https://www.ndtv.com/world-news/taliban-leaders-meet-on-how-to-respond-to-us-drone-strike-in-kabul-that-killed-al-qaeda-leader-ayman-al-zawahiri-report-3221139>.

<sup>7</sup> Basu, Nayanima. "Doha Peace Pact in Tatters as US & Taliban Accuse Each Other of Violations after Zawahiri Killing." ThePrint, 3 Aug. 2022, <https://theprint.in/diplomacy/doha-peace-pact-in-tatters-as-us-taliban-accuse-each-other-of-violations-after-zawahiri-killing/1066619/>.

<sup>8</sup> *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States*, Judgment on Jurisdiction and Admissibility, ICJ GL No 70

for the US to justify an ongoing armed attack that required self-defence. The UN Security Council additionally published a report suggesting that al-Qaeda lacks “external operational capability” and is therefore not an immediate international threat to any country.<sup>9</sup> However, it could be argued that Zawahiri’s threat was that of an imminent armed attack and could attract the principle of anticipatory self-defence. But, since no letter under Article 51 has been sent to the UNSC by the US, which is required to justify self-defence, the self-defence principle cannot apply to this attack. In the absence of both the consent of Afghanistan and the lack of applicability of Article 51, it is therefore argued that the strike is considered illegal under the principles of *jus ad bellum*.

## **2. International Humanitarian Law**

IHL, or the law of armed conflict, are a set of principles that regulate the conduct of States engaged in armed conflict and sets out rules regarding the methods and means of warfare. Individual drone strikes, by themselves, may usually not fall under the purview of IHL, unless they are being used in the context of a pre-existing non-international armed conflict (NIAC).<sup>10</sup> If, based on IHL, a State is said to be in NIAC, then the IHL becomes applicable to their actions. The incorrect designation of a NIAC to justify military action would delegitimize drone strikes under the IHL. It is therefore important to identify if the strike on Zawahiri can be considered a part of an armed conflict. For the longest time, the US has claimed that they are in armed conflict with al-Qaeda under international law,<sup>11</sup> meaning the IHL would give them legal authority for strikes against them. In 2001, it was branded a NIAC, because it met Common Article 3 of the Geneva Conventions

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<sup>9</sup> United Nations Security Council (UNSC) 573 (15 July 2022) UN Doc S/2022/547. Accessed at <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S%202022%20547.pdf>

<sup>10</sup> Heyns, Christof, et al. “THE INTERNATIONAL LAW FRAMEWORK REGULATING THE USE OF ARMED DRONES.” *The International and Comparative Law Quarterly*, vol. 65, no. 4, 2016, pp. 791–827. *JSTOR*, <http://www.jstor.org/stable/26348270>. Accessed 20 Mar. 2023.

<sup>11</sup> United States Department of Justice. (2011, November 8) “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force.” Accessed at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf>

(1949). However, it can be argued that this NIAC ended when the US withdrew from Afghanistan in August 2021. Additionally, for the latter years of its control in Afghanistan, the US also wasn't directly involved in the operations of al-Qaeda, but of the Taliban. After the 9/11 attacks, al-Qaeda had also become atomistic, with multiple independent factions that may not subscribe to the main faction's ideology. In line with this, many have argued that Zawahiri stopped being relevant years ago and that al-Qaeda's brand of terrorism had been broken down into more locally based terrorism rather than 'terrorism against the West.'<sup>12</sup> This would mean that the US cannot claim that they are currently engaged in armed conflict with al-Qaeda and are therefore sanctioned under IHL to engage in drone strikes.

IHL directs that civilians must not be an object of the attack and that civilian status must be presumed unless they are a direct part of the hostilities.<sup>13</sup> This distinction must include all people who are neither members of a State's armed forces nor members of organized armed groups. The incorrect designation of persons as targetable or disproportionate civilian harm would render drone strikes illegal under the IHL framework.<sup>14</sup> If it is assumed that the US was engaged in armed conflict with al-Qaeda, it is argued that the killing would still not meet the principle of distinction required under IHL. The Supreme Court of the US once held that the conflict between the US and al-Qaeda was a NIAC, and the US has been adopting that view ever since.<sup>15</sup> After 9/11, it can be understood if the US government took the position that Zawahiri constituted a combatant and not a civilian that participated in hostilities. However, after nearly 2 decades, it cannot be said that the

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<sup>12</sup> Hassan, Hassan. "Zawahiri's Death Is Anticlimactic to Al Qaeda's Demise." *New Lines Magazine*, 7 Aug. 2022, <https://newlinesmag.com/argument/zawahiris-death-is-anticlimactic-to-al-qaedas-demise/>.

<sup>13</sup> Heyns, Christof, et al. "THE INTERNATIONAL LAW FRAMEWORK REGULATING THE USE OF ARMED DRONES." *The International and Comparative Law Quarterly*, vol. 65, no. 4, 2016, pp. 791–827. *JSTOR*, <http://www.jstor.org/stable/26348270>. Accessed 20 Mar. 2023.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Hamdan v. Rumsfeld* 568 U.S. 557

same is true. Additionally, Article 4 of the Third Geneva Convention, read with Article 43 of the Additional Protocols 1, defines who is a combatant under armed conflict, and IHL further adds that they are only a distinct group only under an IAC. Given that the armed conflict with al-Qaeda was considered a NIAC, it is argued that Zawahiri would not have been classified as a combatant. However, the International Committee of the Red Cross has opined that in some circumstances under a NIAC, members of an armed group are targetable continuously, because they are engaged in “continuous combat function.”<sup>16</sup> But it is still required to be proved that Zawahiri, who was around 70 years old at the time of his killing, was engaged in combat function, which, based on the previous arguments, is unlikely. In line with this, it is also argued that he also cannot be shown to be a civilian taking direct part in hostilities as required under IHL, and therefore cannot be subject to the US’s force. Thus, even if it was accepted that the US was in armed conflict with al-Qaeda, the principle of distinction would not allow for the drone strike against Zawahiri to be considered legal.

### **3. International Human Rights Law**

The IHRL framework aims to safeguard individual rights, such as the right to life, the right to liberty and security of person, and the right to due process, in both times of armed conflict (national and international) and times of peace. A general rule of IHRL is that any deprivation of rights must be non-arbitrary, meaning that intentional lethal force only be used as a last resort to protect life.<sup>17</sup> The use of force must therefore be necessary as well as proportionate to the goal being pursued. When a drone strike occurs outside armed conflict, there is no application of the IHL, and the

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<sup>16</sup> ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Geneva, May 2009; available at <http://www.icrc.org>.

<sup>17</sup> Heyns, Christof, et al. “THE INTERNATIONAL LAW FRAMEWORK REGULATING THE USE OF ARMED DRONES.” *The International and Comparative Law Quarterly*, vol. 65, no. 4, 2016, pp. 791–827. *JSTOR*, <http://www.jstor.org/stable/26348270>. Accessed 20 Mar. 2023.



State's human rights obligations are only governed by the IHRL framework, and thus require the State to meet the principle of proportionality and necessity.<sup>18</sup> It is argued by the United States that al-Qaeda's threat to them required the use of such force in eliminating Zawahiri.<sup>19</sup> It cannot be justified that the killing of Zawahiri would be the end of al-Qaeda, and his death would have protected the US from any possible future attacks. Previous arguments in this paper have also highlighted that the nature of the threat may not have been severe enough and the role of Zawahiri might not have been important enough to necessitate his killing, and therefore it doesn't meet the principle of proportionality or necessity.

Under IHRL, states are also bound by any human rights treaties they are party to, even concerning extraterritorial conduct.<sup>20</sup> The US, in 1992, ratified the International Covenant on Civil and Political Rights, which became a federal law based on the supremacy clause of the US Constitution. During times of no conflict, the ICCPR only permits the use of force in self-defence or the defence of others against a threat. It is therefore argued that the US has violated Zawahiri's right to life under the ICCPR, considering it has been shown that he posed no immediate threat to the US, and at the time of his death he was simply standing on a balcony. The US has argued that the human rights obligations assigned to them under the ICCPR do not apply to extraterritoriality,<sup>21</sup> which is against the tenets of IHRL. They could argue that they have not violated any IHRL because Zawahiri was not within the territory of the United States at the time of the attack.

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<sup>18</sup> Ibid.

<sup>19</sup> "Background Press Call by a Senior Administration Official on a U.S. Counterterrorism Operation" The White House, 1 August 2022, <https://www.whitehouse.gov/briefing-room/press-briefings/2022/08/01/background-press-call-by-a-senior-administration-official-on-a-u-s-counterterrorism-operation/>. Press release.

<sup>20</sup> Heyns, Christof, et al. "THE INTERNATIONAL LAW FRAMEWORK REGULATING THE USE OF ARMED DRONES." *The International and Comparative Law Quarterly*, vol. 65, no. 4, 2016, pp. 791–827. *JSTOR*, <http://www.jstor.org/stable/26348270>. Accessed 20 Mar. 2023.

<sup>21</sup> Schaak, Beth Van. "The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now Is the Time for Change." *International Law Studies*, vol. 90, no. 20, 2014, pp. 20–65.

However, multiple international law bodies have held that this view is wrong, including the ICJ,<sup>22</sup> The Inter-American Human Rights system,<sup>23</sup> the European Court of Human Rights<sup>24</sup> and even some UN bodies.<sup>25</sup> However, it is said to be only applicable when there is an exercise of jurisdiction by the State. It can be argued that when individuals abroad are subjects of targeted killings, the State intends to exercise control over them, hence bringing them under the State's jurisdiction.<sup>26</sup> This would compel the state to exercise its human rights treaty obligations. While this argument about jurisdiction on treaty obligations may or may not hold depending on the understanding of 'under the jurisdiction', the lack of proportionality and necessity of the killing under the IHRL framework can still make the strike illegal.

#### IV. Conclusion

The United States has always proudly purported the concepts of justice and rule of law, and it only seems right to demand from them accountability for the legality of their actions that might violate it. While they might argue that their actions are justified by their domestic powers, such as those granted by the Authorization for Use of Military Force, 2001, their international law commitments cannot be ignored in pursuance of military action against terrorism. As seen above, their actions violate all three relevant pillars of international law without any justification. While the target in question has taken responsibility for multiple acts of terrorism against the US, the blatant disregard

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<sup>22</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136

<sup>23</sup> Saldano v. Argentina, Petition, Inter-Am. C.H.R., Report No. 38/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999)

<sup>24</sup> Al-Skeini and Other vs The United Kingdom [GC], no.52207/99, 12 Dec 2001

<sup>25</sup> United Nations Human Rights Committee General Comment No. 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), 80<sup>th</sup> Sess, adopted 29 March 2004 CCPR/C/21/Rev.1/Add. 1326. <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFu uJQRnbJEaUhby31WiQPI2mLFDe6ZSwMMvmQGVHA%3D%3D>

<sup>26</sup> Heyns, Christof, et al. "THE INTERNATIONAL LAW FRAMEWORK REGULATING THE USE OF ARMED DRONES." *The International and Comparative Law Quarterly*, vol. 65, no. 4, 2016, pp. 791–827. *JSTOR*, <http://www.jstor.org/stable/26348270>. Accessed 20 Mar. 2023.

of international law for revenge is a dangerous precedent to set. Accountability and transparency must be demanded; the US must prove their actions are lawful within the scope of the exceptions provided, and not a lawless execution of a criminal suspect without a trial. Only then will Biden's statement, "Justice has been served," hold true.

The study on Ayman Al-Zawahiri's death also raises a question on whether military responses in combating terrorism, specifically in the form of targeted killings, have effective international law safeguards to protect both the States and the individuals involved. The fact that targeted killings have become easier and more widespread due to technological advancements should ensure that the principles of international law are upheld more rigorously. The individual rights of the targeted should be appropriately balanced against the law of armed conflict, which seems to be more tolerant of such responses. With a war currently raging between Russia and Ukraine, it serves to be more important to ensure that the international rule of law is not at risk, specifically when it comes to areas such as targeted killings that were not part of the original understanding the framework was created under. The international community must demand more accountability around drone warfare; we cannot let human life be taken, meaninglessly, with a click of a button.